IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2006 Session

TABITHA G. LAWSON JOHNSON v. BOBBY C. JOHNSON

Appeal from the Chancery Court for Hancock County
No. 7991 Thomas R. Frierson, II, Chancellor

No. E2006-01434-COA-R3-CV - FILED DECEMBER 18, 2006

In this post-divorce case, the father petitioned the trial court to modify the parties' permanent parenting plan and designate him as the primary custodial parent of the parties' two minor children. The father alleged that the relationship between the mother and the teenage children was deteriorating to the point that the children had threatened to run away from home, that the children had expressed a desire to live with their father, and that the mother had numerous men come to her residence and spend the night. After a hearing, the trial court held there had been no material change in circumstances justifying a change of custody from the mother to the father. After review, we find that the father's allegations were largely not substantiated by the proof at the hearing. We do not find that the evidence preponderates against the trial court's conclusion. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Daniel G. Boyd, Rogersville, Tennessee, for the Appellant, Bobby C. Johnson.

Douglas T. Jenkins, Rogersville, Tennessee, for the Appellee, Tabitha G. Lawson Johnson.

OPINION

I. Background

The parties, Tabitha G. Lawson Johnson and Bobby C. Johnson, were divorced in 1993. Ms. Johnson was designated the primary residential parent of their two children, who were ages 13 and 16 at the time of the November 30, 2005 hearing on the present action. On March 18, 2005, Mr. Johnson filed a petition to modify the permanent parenting plan by changing primary custody from Ms. Johnson to him. Mr. Johnson's petition alleged that Ms. Johnson forced the children to clean

the house "at all hours of the night;" that Ms. Johnson "treated the children so badly that [they] have threatened to run away from home;" that Ms. Johnson "has numerous men to come to her residence and spend the night;" and that Ms. Johnson's home "is an unstable and unsuitable environment for the minor children." Ms. Johnson answered, denying the allegations of the petition and denying that a material change of circumstances had occurred.

After a brief hearing at which the trial court heard the parties' testimony and the minor children's testimony *in camera*, the trial court held that Mr. Johnson had failed to carry his burden of proof to establish that a material change of circumstances had occurred since the entry of the permanent parenting plan.

II. Issue Presented

Mr. Johnson appeals, raising the sole issue of whether the trial court erred in finding no material change in circumstances to warrant change of primary custody from Ms. Johnson to him.

III. Standard of Review

We review this non-jury case *de novo* upon the record of the proceedings below, with a presumption of correctness as to the trial court's findings of fact "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *see also Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). There is no presumption of correctness with regard to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

Trial courts are vested with wide discretion in matters involving custody of children. *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973). Accordingly, a trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). A discretionary judgment of a trial court should not be disturbed unless it affirmatively appears that "the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining." *Marcus v. Marcus***,** 993 S.W.2d 596, 601 (Tenn. 1999) (quoting *Ballard v. Herzke***,** 924 S.W.2d 652, 661 (Tenn. 1996)).

The Supreme Court has noted on several occasions that the details of custody and visitation with children are "peculiarly within the broad discretion of the trial judge." *Eldridge*, 42 S.W.3d at 85; *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988). A determination of custody and visitation often hinges on subtle factors such as the parents' demeanor and credibility during the trial proceedings. *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). Absent some

compelling reason otherwise, considerable weight must be given to the trial court's judgment with respect to the parties' credibility and their suitability as custodians of children. *Bush v. Bush*, 684 S.W.2d 89 (Tenn. Ct. App. 1984). In cases such as this, the welfare and best interests of the child are of paramount concern. T.C.A. § 36-6-106(a); *Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993).

IV. Analysis

We begin our review by reaffirming the premise that custody and visitation decisions are among the most important decisions that courts make. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Promoting the child's welfare by creating an environment that promotes a nurturing relationship with both parents is the chief purpose in custody decisions. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996). Because children are more likely to thrive in a stable environment, the courts favor existing custody arrangements. *Id.* at 627; *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or reasonably foreseeable when the decision was made. *Young v. Smith*, 246 S.W.2d 93, 95 (1952); *Steen*, 61 S.W.3d at 327; *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998).

The governing statute in this case, T.C.A. § 36-6-101(B), provides that in cases wherein a party seeks to modify an existing custody arrangement, the threshold issue is whether a material change in circumstances has occurred since the initial custody determination:

> (B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.
> (i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

T.C.A. § 36-6-101(B).

We recognize that the circumstances of children and their parents change – children grow older, their needs change, one or both parties remarry. But not all changes in the circumstances of the parties and the child warrant a change in custody. There are no hard and fast rules for when there has been a change of circumstance sufficient to justify a change in custody. *Cranston v. Combs*, 106

S.W.3d 641, 644 (Tenn. 2003). A court's decision with regard to modification of custody is contingent upon the circumstances presented, and the court should consider whether:

> 1) the change occurred after the entry of the order sought to be modified,
>
> 2) the changed circumstances were not reasonably anticipated when the underlying decree was entered, and
>
> 3) the change is one that affects the child's well-being in a meaningful way.

Kendrick, 90 S.W.3d at 570; *Blair v. Badenhope,* 77 S.W.3d 137 (Tenn. 2002); *Cranston,* 106 S.W.3d at 644. Custody decisions are not intended, and should not be designed, to reward parents for prior virtuous conduct, nor to punish them for their human frailties or past missteps. *Oliver v. Oliver,* No. M2002-02880-COA-R3-CV, 2004 WL 892536, at *2 (Tenn. Ct. App. M.S., Apr. 26, 2004); *Kesterson,* 172 S.W.3d at 561; *Earls v. Earls,* 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000).

The party seeking to change an existing custody arrangement has the burden of proving that there has been a material change of circumstances. T.C.A. § 36-6-101(B). If the person seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not reexamine the comparative fitness of the parents, *Caudill v. Foley,* 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a "best interests of the child" analysis. In the absence of proof of a material change in the child's circumstances, the trial court should not change custody. *Hoalcraft,* 19 S.W.3d at 828.

Applying the above analysis to the circumstances and proof presented in this case, we hold that the evidence does not preponderate against the trial court's conclusion that there was no material change in the children's circumstances since the entry of the most recent permanent parenting plan. The proof presented in this case consisted of the testimony of the parties and the children,[1] and therefore the credibility and demeanor of the witnesses was an important factor. The allegations that Ms. Johnson had numerous men staying over at her residence, and that she "forced the minor children to clean the house at all hours of the night," were denied by Ms. Johnson and largely unsubstantiated by the proof presented at the hearing. Mr. Johnson presented no evidence supporting his allegation that Ms. Johnson's home was "an unstable and unsuitable environment."

The testimony of the witnesses, fairly distilled and summarized, produces this conclusion: the children and Ms. Johnson frequently get into arguments and conflicts over her requests that they keep their rooms clean and do chores around the house. The children have expressed their desire to live with their father, perhaps for a number of reasons, but clearly also because they perceive that they will be given "more freedom" at Mr. Johnson's house. We do not find this to be an unusual situation for a household with two teenage children, and certainly not one warranting the "drastic

[1] The only physical evidence introduced was three pictures of the daughter's room, presumably to show how cluttered it was at the time.

remedy" of changing custody. *See Oliver* 2004 WL 892536, at *5; *Perez v. Kornberg*, No. M2004-01909-COA-R3-CV, 2006 WL 1540254, at *16 (Tenn. Ct. App. W.S., June 6, 2006). The proof presented does not indicate that the children's well-being had been adversely affected in any significant way. We thus agree with and affirm the Chancellor's judgment denying Mr. Johnson's petition to modify the permanent parenting plan.

V. Conclusion

The judgment of the trial court is affirmed. Costs on appeal are assessed to the Appellant, Bobby C. Johnson.

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SHARON G. LEE, JUDGE